UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MICHAEL SALISBURY, Plaintiff(s), v. DETECTIVE MICHAEL WARD, et al., Defendant(s).	No. C06-2993 MMC (BZ) **ORDER GRANTING PLAINTIFF RELIEF FROM ADMISSIONS**

By Order dated March 26, 2007, the Honorable Maxine M. Chesney referred all discovery disputes in this matter to me. By Order dated June 8, 2007, Judge Chesney directed plaintiff to notice before me any motion for relief from admissions pursuant to Federal Rule of Civil Procedure 36(b). Plaintiff filed his motion for relief from admissions, and defendants filed an opposition. For the reasons stated, I **GRANT** plaintiff's request for relief.

The essential fact are not in dispute. On January 11, 2007, defendants served on plaintiff requests for admission, requests for production of documents and interrogatories.

Simpich Decl. ¶ 3, Exh. 1-A. Plaintiff's responses to the requested admissions were due thirty days after service. Fed. R. Civ. P. 36(a). In e-mail exchanges occurring between February 27 and 28, plaintiff's counsel, William Simpich, requested that defendants re-send their discovery requests, explaining that the documents had been misplaced. Id. at ¶¶ 4-5, Exhs. 2-3. He also requested additional time to respond to the discovery. Id. at ¶ 5, Exh. 3. Defendants' counsel, Tricia Hynes, refused to stipulate to acceptance of late responses to the requested admissions but agreed to give plaintiff seven additional days to reply to the remaining discovery.[1] Id. at ¶ 6, Exh. 4.

Over the ensuing weeks, defendants pursued the completion of discovery via a number of motions noticed before me.[2] Simpich again asked defendants to stipulate to allow late admissions responses. Hynes refused. Id. at ¶ 9. Simpich attempted to e-mail all pending responses to Hynes on April 23.[3] Inadvertently, however, Simpich e-mailed to defendants only the response to production of documents. The remainder

---

[1] On the e-mail, Hynes explained that requests for admissions were "deemed statutorily and automatically admitted," and that defendant "can't stip to the responses." Hynes also suggested that plaintiff consider settling the matter - a suggestion that Simpich claims upset him greatly. See Simpich Decl. ¶ 6, Exh. 4.

[2] Indeed, I ultimately sanctioned plaintiff for his failure to timely respond to the discovery requests. See Docket No. 93.

[3] Upon receipt of Simpich's April 23 e-mail, Hynes informed Simpich again that she would not accept the late-filed responses to the requests for admissions. Simpich Decl. ¶ 12, Exh. 6.

was e-mailed some two weeks later. Thus, it wasn't until late-April or early-May that plaintiff served its responses to defendants' January discovery requests. See id. at ¶¶ 11-13. Plaintiff included substantive responses to defendants' requests for admissions and interrogatories. See id. at ¶ 3, Exh. 1-B.

Pending before Judge Chesney is defendants' motion for summary judgment. Arguing in part that he needed time to pursue Rule 36(b) relief, and pursuant to Rule 56(f), plaintiff was granted an extension of time to file his opposition. See Docket No. 108. Trial in this matter has been set for September 4, 2007. See Docket No. 33. Fact discovery closed March 23, 2007. Id.

When a party fails to timely respond to requests for admission, those requests are automatically deemed admitted. See Fed. R. Civ. P. 36(a). "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Fed. R. Civ. P. 36(b). Withdrawal or amendment is appropriate when (1) presentation of the merits of the action is furthered, and (2) the party who obtained the admission will not be prejudiced in maintaining the action or defense on the merits. See Fed. R. Civ. P. 36(b)). "[A] district court must specifically consider both factors under the rule before deciding a motion to withdraw or amend admissions." Conlon v. United States, 474 F.3d 616, 622 (9th Cir. 2007). Rule 36(b), however, is permissive with respect to withdrawal. Id. at 621.

"'The first half of the test in Rule 36(b) is satisfied when upholding the admissions would practically eliminate any presentation of the merits of the case.'" Conlon, 474 F.3d at 622 (quoting Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir.1995)). Here, many of the admissions go directly to core issues in the litigation, including the ultimate question of liability. See Simpich Decl. ¶ 3, Exh. 1-A (Defendant's Request for Admissions), at Request No. 1 (admits that plaintiff suffered no damages as a result of the incident); id. at Request No. 4 (admits that plaintiff has no facts to support his Fourth Amendment claim); id. at Request No. 5 (admits that plaintiff has no facts to support his claim based on Cal. Civ. Code § 52.1); id. at Request No. 6 (admits that plaintiff has no facts to support his claim that defendants conspired to deprive him of his civil rights). Thus, the first prong of the Rule 36(b) test is met.

As to the second prong, defendants have the burden of establishing that they will be prejudiced if the admissions are withdrawn. Conlon, 474 F.3d at 622. "The prejudice contemplated by Rule 36(b) is 'not simply that the party who obtained the admission will now have to convince the factfinder of its truth.'" Hadley, 45 F.3d at 1348 (quoting Brook Village North Associates v. Gen. Elec. Co., 686 F.2d 66, 70 (1st Cir. 1982)). "'Rather, it relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence' with respect to the questions previously deemed admitted." Id. A lack of discovery, without more,

does not constitute prejudice. Conlon, 474 F.3d at 624. Prejudice is more likely to be found where the motion for withdrawal is made during trial or when a trial is imminent. See Conlon, 474 F.3d at 624; Hadley, 45 F.3d at 1348.

Defendants complain that plaintiff inexplicably waited several months before seeking relief from his admissions, and that the delay has substantially prejudiced their case. In particular, defendants aver that their summary judgment motion relies heavily on the admissions; that they did not take "extensive discovery" on the admitted matters; and that granting the plaintiff's motion would likely require re-opening fact discovery and reassessment by their experts at great cost to defendants. Defendants, however, fail to point to specific evidence or testimony that is now inaccessible. Simply because defendants may have to reassess their motion for summary judgment or their experts' opinions does not demonstrate that they will be unduly prejudiced in proving up their case on the merits.

Moreover, defendants have known at least from the time they received plaintiff's interrogatory answers that each of the five contested admissions would be denied. For example, defendants' Interrogatory No. 8 asked plaintiff to describe his damages, which he did in his answer. See Simpich's Decl. ¶ 3, Exh. 1-B. At the same time as defendants propounded this interrogatory, they requested plaintiff to "admit that you suffered no damages as a result of the incident." See id. at Request for Admission No. 1. From the record before me, the court wonders for what proper purpose consistent with Rule 1,

defendants propounded this request for admission before the interrogatory was answered. In any event, they certainly knew that plaintiff claimed he was damaged. See also First Amended Complaint for Damages (Docket No. 49), at 8 (describing damages suffered by plaintiff). It likewise appears that plaintiff's interrogatory answers make clear that Requests for Admissions No. 2, 4, 5, and 6 would be denied.

Had defendants propounded their Requests for Admission after the interrogatories had been answered, without further explanation I would likely have deemed many of them frivolous, oppressive and sanctionable under Rule 37. For purposes of this motion, I find that the defendants have not established that they were prejudiced by the failure to receive timely responses to the Requests for Admission in dispute.

It is difficult to justify plaintiff's counsel's dilatory approach to responding to defendants' discovery, a fact which the court has noted on earlier occasions. At times, I condition an order granting a party relief from admissions on the payment to the other party of its attorney's fees incurred in opposing the motion. I will not do so here because I do not want to encourage the use of requests for admission as defense counsel has used them.

The matters deemed admitted go directly to the core of plaintiff's case. Related discovery demonstrates that relief from the admissions will further presentation of the merits of the case. Defendants have failed to establish the prejudicial impact of the withdrawal of the admissions. For these reasons, and for those discussed above, plaintiff's motion is

GRANTED. His automatic admissions are withdrawn, and his late-filed responses are deemed operative.

Dated: July 2, 2007

Bernard Zimmerman
United States Magistrate Judge

G:\BZALL\-REFS\SALISBURY\RELIEF.ADMISSIONS.ORDER.wpd